Jurisdiction.

The judgment of the Court of Appeals of Maryland (App. A 13) was entered on August 9, 1961 (App. A 1). No rehearing was requested or ordered. By order of Mr. Chief Justice Warren dated November 1, 1961, the time to file this petition for a writ of certiorari was extended to and including November 27, 1961. The jurisdiction of this Court is invoked under 28 U. S. C. 1257, subdivision 3, the court below having determined that the state statute (Code of Maryland (1957), Art. 27, §418) is not repugnant to the Constitution of the United States and that petitioners had not been deprived of rights, privileges and immunities under the Constitution of the United States as drawn in question and claimed by petitioners.

Questions Presented.

1. Whether the statute, Code of Maryland (1957), Art. 27, §418, upon its face and as construed by the court below, abridges the freedoms of speech and press guaranteed by the provisions of the First and Fourteenth Amendments to the United States Constitution, and arbitrarily deprives persons including these petitioners of liberty and property without due process of law in violation of the due process provisions of the Fourteenth Amendment to the United States Constitution.

2. Whether the standards for judging obscenity under the statute, Code of Maryland (1957), Art. 27, §418, as enunciated by the court below, to include all writings and pictures in writings without limitation having a tendency to excite lustful thoughts renders the statute unconstitutional because the statute, so construed, invades freedoms of speech and press incor-

porated in the liberty protected from state action by the due process clause of the Fourteenth Amendment, and creates such vague and ambiguous standards for judging obscenity as to deprive persons including these petitioners of their liberty and property without due process of law in violation of the due process provisions of the Fourteenth Amendment to the United States Constitution.

3. Whether the construction of the statute, Code of Maryland (1957), Art. 27, §418, by the court below permitting the prohibitions of the law to be applied to all writings and pictures in writings, whether "hard-core pornography" or not, renders the statute unconstitutional as abridging the freedoms of speech and press guaranteed by the provisions of the First and Fourteenth Amendments to the United States Constitution, and arbitrarily deprives persons including these petitioners of liberty and property without due process of law in violation of the due process provisions of the Fourteenth Amendment to the United States Constitution.

4. Whether the standards for judging obscenity under the statute, Code of Maryland (1957), Art. 27, §418, as applied by the court below to leave the ingredient of "contemporary community standards" undefined as to the geographical area encompassed by the "community", and which in disregard of an uncontradicted record showing the material involved to be within the limits of candor, equates contemporary community standards with the subjective reflections and moral outlook of the trier of the facts, renders the statute unconstitutional as abridging the freedoms of speech and press guaranteed by the provisions of the

First and Fourteenth Amendments to the United States Constitution, and arbitrarily deprives persons including these petitioners of liberty and property without due process of law in violation of the due process provisions of the Fourteenth Amendment to the United States Constitution.

5. Whether the construction of the statute, Code of Maryland (1957), Art. 27, §418, by the court below permitting the prohibitions of the law to be applied to all publications containing "pictures or drawings of nude or semi-nude women" interspersed with "suggestive sex stories" renders the statute unconstitutional as abridging the freedoms of speech and press guaranteed by the provisions of the First and Fourteenth Amendments to the United States Constitution, and arbitrarily deprives persons including these petitioners of liberty and property without due process of law in violation of the due process provisions of the Fourteenth Amendment to the United States Constitution.

6. Whether the failure of the court below to fulfill its obligatory duty to make a constitutional judgment and reflective independent appraisal of the publications involved herein for the purpose of determining whether the publications are protected by the provisions of the Constitution of the United States as claimed, instead of merely treating the issues determined by the trial court as questions of fact to be set aside only if clearly erroneous, constituted an abdication of an essential judicial function required by the supremacy clause of the Constitution and arbitrarily deprived these petitioners of a meaningful hearing and their liberty and property without due process of law in violation of

the due process provisons of the Fourteenth Amendment to the United States Constitution.

7. Whether, in the light of the record barren of any proof that the publications herein went substantially beyond contemporary community standards in depiction or representation of sex or nudity; barren of any proof that the publications appeal to a shameful or morbid interest in sex or nudity, or excite lustful thoughts; barren of any proof of knowledge of the contents or the alleged objectionable character of the publications by these petitioners or intent to appeal to prurient interest or excite lustful thoughts; and barren of any probative evidence that the publications were calculated or had a tendency to excite lustful thoughts, the petitioners have been convicted under the statute, Code of Maryland (1957), Art. 27, §418, without any evidence of their guilt and thus arbitrarily deprived petitioners of their liberty and property without due process of law in violation of the due process provisions of the Fourteenth Amendment to the United States Constitution.

8. Whether the statute, Code of Maryland (1957), Art. 27, §418, as applied to the five magazines here involved, violates the free speech and due process provisions of the First and Fourteenth Amendments to the United States Constitution, and arbitrarily deprives persons including these petitioners of liberty and property without due process of law in violation of the due process provisions of the Fourteenth Amendment.

9. Whether the statute, Code of Maryland (1957), Art. 27, §418, as construed and applied, arbitrarily and capriciously denies these petitioners the equal pro-

tection of the laws in violation of the equal protection provisions of the Fourteenth Amendment to the United States Constitution.

Constitutional and Statutory Provisions Involved.

The pertinent provisions of the First and Fourteenth Amendments to the Constitution of the United States, and the provisions of the Code of Maryland (1957), Art. 27, §418, involved herein are printed in Appendix C, *infra*, 32-33.

Statement.

The petitioners, who engage in the retail sale of books and magazines in Baltimore City (App. A 1) were each separately indicted [R. 1-6] for alleged violations of the state obscenity statute, Code of Maryland (1957), Art. 27, §418, in the latter part of 1960.

The case against each of the petitioners at the consolidated trial before the court, without a jury, consisted merely of proving that various members of the Baltimore City Police Department and a member of the Criminal Justice Commission, acting under instructions [R. 21-22, 27, 36, 58] made specific purchases of six magazines [Exs. 1A, 1B, 2, 3A, 3B, 4B; R. 14, 20, 27, 38] and a set of photographs [Ex. 5; R. 49] in the establishments of the several petitioners. The proof also showed that the magazines and photographs aforesaid were openly displayed and offered for sale without overcharge along with other types of magazines on news stands or in the establishments of the several petitioners [R. 16, 21, 28, 39, 50]. There was also evidence at the trial that pub-

lications of a similar type had been on display and sold in Baltimore City for at least five years prior to the arrest of the petitioners [R. 22-23, 30-37, 55-56].

At the conclusion of the trial, after consideration of argument and briefs [R. 62], the trial court stated that the court had "examined and appraised" the publications and photographs involved in the prosecution [R. 62; App. B 31]; that "applying contemporary community standards" the court had concluded that all the material and photographs were "neither literary in nature, artful in presentation, nor innocent in purpose" [R. 62-63; App. B 31]; that the dominant theme of the material "deals with sex in a manner appealing to prurient interests, having a tendency to excite lustful thoughts" [R. 63; App. B 31]; and that the publications and photographs were therefore "lewd, obscene and indecent" in violation of the obscenity statute as charged in the indictments [R. 63; App. B 31]. Each of the petitioners, after the finding of guilt, was fined either two hundred dollars or one hundred dollars and costs [R. 63-64].

Upon appeal to the Court of Appeals of Maryland, petitioners urged that the material as shown in the record was not obscene because the said material did not go beyond contemporary community standards in depiction or representation of sex or nudity; that a finding of obscenity would contravene the provisions of the First and Fourteenth Amendments to the United States Constitution; and that under the decisions of this Court the state statute could only be constitutionally applied to "hard-core pornography" which the material here involved clearly was not [R. 89-124].

The opinion of the Court of Appeals of Maryland was by a divided court, Hammond, J. dissenting (App. A 13-30). The court below considered and disposed of the federal questions adversely to petitioners (App. A 1-13). The court held that the convictions for sale of the set of photographs [Ex. 5, R. 49] and one of the magazines [Ex. 1A, R. 14] were constitutionally impermissible, because the set of photographs were "not necessarily obscene" since "mere nudity in and of itself is not obscene," and because the textual matter accompanying the illustrations in the one magazine were "in the main innocuous" and although the pictures in the publications were "obviously intended to arouse sex appeal," they were not "strictly obscene" (App. A 3-4). The court below therefore held that the trial court had erred in convicting some of the petitioners for sale of the aforesaid material (App. A 4).

With respect, however, to the sale of the other five magazines [Exs. 1B, 2, 3A, 3B, 4B; R. 14, 20, 27, 38, 73-78], the court below held that the judgments of conviction of each of the petitioners for sale of one or more of the said magazines should be affirmed (App. A 13). The court below rejected the claims of petitioners that the material did not exceed "contemporary community standards" (App. A 3), that if the materials were deemed obscene under the statute, then "the statute violated the First and Fourteenth Amendments to the Constitution of the United States" (App. A 3), and the court rejected the claim that petitioners were "immune from prosecution under the statute" because the material involved was not "hard-core pornography" (App. A 11-12).

While assumedly agreeing with the minority opinion that the material involved did not constitute hard-core pornography, the court below held that the state statute could be properly applied to any material having a "tendency to excite lustful thoughts" without offending the First and Fourteenth Amendments to the United States Constitution (App. A 2). The court below held that the "findings of fact" of the trial court were correct (App. A 5), and after reviewing, distinguishing and explaining the decisions of this Court in *Roth v. United States*, *Alberts v. California*, 354 U. S. 476; *Times Film Corp. v. City of Chicago*, 355 U. S. 35; *One, Inc. v. Olesen*, 355 U. S. 371; *Sunshine Book Co. v. Summerfield*, 355 U. S. 372, *Adams Newark Theatre Co. v. City of Newark*, 354 U. S. 931, *Manual v. United States*, 355 U. S. 180, *Butler v. Michigan*, 352 U. S. 380, *Kingsley Books, Inc. v. Brown*, 354 U. S. 436, *Kingsley International Pictures Corp. v. Regents*, 360 U. S. 684, and *Smith v. California*, 361 U. S. 147 (App. A 6-12) held that the trial court had correctly decided the applicable law (App. A 13). The court specifically rejected the "hard core pornography" test as recently enunciated by the New York Court of Appeals in *People v. Richmond County News Co.*, 9 N. Y. 2d 578, 175 N. E. 2d 681 (1961) (App. A 11-12), and the "variable obscenity" test for judging obscenity suggested by Dean Lockhart and Professor McClure (App. A 12).

The dissenting opinion of Judge Hammond (App. A 13-30) supported the assertion of petitioners that there was no evidence in the record to show that community standards had been exceeded (App. A 13-14), Judge Hammond expressing the view that community

standards had clearly not been exceeded (App. A 20-21). The dissenting opinion also agreed with petitioners that the state statute could only be constitutionally applied to hard core pornography (App. A 21-22). Judge Hammond held that sex and nudity which was all that was involved in the case were not the same as obscenity (App. A 20), and that the majority of the court below had failed to perform their obligatory duty to make a constitutional judgment with respect to the material involved in the light of the claimed violations of provisions of the United States Constitution (App. A 13-15). Contrary to the majority holding, Judge Hammond held, therefore, that the state statute as construed and applied was unconstitutional (App. A 30).

Reasons Relied on for the Allowance of the Writ.

1. The court below has decided federal questions of substance not heretofore determined by this Court; and has decided substantial federal questions in a way not in accord with the applicable decisions of this Court. The court below did not follow the proper standards for judging obscenity in applying the state statute, and thus offended constitutional safeguards against convictions based upon protected material. The statute, as construed and applied, therefore fails to give persons adequate notice of what is prohibited. The door barring federal and state intrusion into the area of freedoms of speech and press has been opened more than a slight "crack." *Roth v. United States (Alberts v. California*, 354 U. S. 476, 488; *Smith v. California*, 361 U. S. 147, 155.

While petitioners detail the aforesaid argument in the discussion which follows, petitioners believe it appropri-

ate, by way of preface, to comment initially on the broad censorship attempted below upon magazines deemed risque and suggestive of sex. It should be noted, it is respectfully submitted, that the court below denominated the publications herein as those which are "commonly known or described as 'girlie' magazines" (App. A 2), and the court below acknowledged that the uncontradicted record showed that the magazines "were openly displayed and offered for sale without overcharge along with other types of magazines on newsstands or in the establishments of the several appellants" (App. A. 2). Moreover, the court below stated, "the record shows that publications of a similar type had been on display and sold in the city for at least five years prior to the arrest of the appellants" (App. A. 2).

(a) At the outset, it appears clear from this Court's decisions that in drawing the line between constitutionally protected material and obscene communications, the divisional mark is not between books and museums on the one hand, and magazines on the other. The line between "the informing and the entertaining" (*Winters v. New York*, 333 U. S. 507, 510) is too elusive in both areas, and "the smoking-room type of humor, featuring, in the main, sex" (*Hannegan v. Esquire, Inc.*, 327 U. S. 146, 151) is not unfamiliar in either field. That the liberty of the press is not confined to any particular sort of publication, this Court has made abundantly clear.[1]

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[1] *Lovell v. Griffin*, 303 U. S. 444; *Schneider v. State*, 308 U. S. 147; *Snyder v. Pool Co. v. Sunasco Hold*, 355 U. S. 372; *One, Inc. v. Olesen*, 355 U. S. 371; *Times Film Corp. v. City of Chicago*, 355 U. S. 35; *Mounce v. United States*, 355 U. S. 180; *Kingsley International Pictures Corp. v. Regents*, 360 U. S. 684; *Talley v. California*, 362 U. S. 60.

(b) Moreover, the publication and distribution of magazines are not recent phenomena, nor have their content been confined to any single area of human interest. They have been prevalent since at least the 18th century, and it has been estimated that some 3¾ billion copies are sold every year. Wood, *Magazines in the United States* (1956), *Preface*, v. Again, magazines are only a part of the journalistic family; that family also consists of newspapers, radio, motion pictures, and television. It is not possible to answer "the question of customary freedom of expression" (A.L.I. *Model Penal Code*, Tent. Draft No. 6, 1957, 47) in the United States without recognition of the fact that magazines are only one of the media which disseminate public information, public opinion, and public entertainment.

(c) "The American public has proved that it will read, at least tolerate and support, a great variety of magazines. . . . It accepts the pretentious, the cultural, and at the other extreme, the crudest of periodical publications. There is the simple fact that the United States population is far larger than it was, and is growing rapidly. It is affluent and can afford to indulge its fancies. The spread and dilution of education has at least made more people susceptible to print and pictures in pleasing format. Acceptance of certain of these magazines by at least a substantial segment of the population that reads at all reflects something of our changing social interests. The response to others reflects the perennial appeal of other subject matter to basic humankind." Wood, *Magazines in the United States* (1956), 331-332. The American magazines have been characterized by the notion that variety is the spice of life, and they have disseminated information

and entertainment in generous proportions. The *Saturday Evening Post* saw the light of day in 1821; the *National Police Gazette* in 1845. Wolseley, *The Magazine World* (1951), 14; Peterson, *Magazines in the Twentieth Century* (1956), 337.[5]

(d) The dangers to free speech and creative literature are as great in the area of magazine censorship

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[5]The same shift in community acceptance of representation and detection of sex or nudity between the nineteenth and twentieth centuries manifests itself in such mass media of communication as magazines, newspapers, motion pictures, radio and television as well as in books, both hardcover and paperback. Changing tastes and habits of the community are reflected in the candid display of nudity and the emphasis on sex which appear in the advertisements of the most respectable newspapers and periodicals. See, the advertisements, for example, in the Magazine Section of the Sunday New York Times. The short story, a common feature of magazines ranging from *True Confessions* to *Cosmopolitan*, have become increasingly explicit and open in the discussion of sex and sex relationships. *True Story*, the first of the confession magazines to appear early in the century, has been succeeded by *True Experiences*, *True Marriage Stories*, *Intimate Romances*, *Love Time Romances*, and the like. Five of the largest "confession" magazines in 1955 had an aggregate circulation of more than 10,000,000. All of these publications, as well as other magazines emphasizing the glamor of the "real" Hollywood and the "real" life of the movie stars, emphasize the free discussion of sex and uninhibited sex life. The modern picture magazine, from *Life* through *Click* and *Pic* and *Scope*, has presented the female figure from every visual angle and in every state of declamation. The *Police Gazette* was the prototype of such magazines as *Captain Billy's Whiz Bang*, *Ballyhoo*, *Esquire*, *Playboy*, *Dare*, *Paramour*, *Eye to Eye*, *Wolf*, *Pep*, *Snappy*, and *Titter*, all of which despite occasional suppression obtained considerable nationwide acceptance. As part of an elaborate pilot study made in 1944 to determine the possibility of launching a new magazine, a survey was made in an east coast city. The sample of magazine readers questioned answered that they read magazines for these reasons in the order: entertainment, increase in knowledge, conversation material, escape, practical information, inspiration." Wood, *Magazines in the United States* (1956), 367. See also Allen, *Lords of Their Minds: An Informal History of the Twenties* (1946); Lasser, *The Control of Moral Content of Sex Censorship in Law and Contemporary Problems* (1955), 672; Wolseley, *The Magazine World* (1951); Peterson, *Magazines in the Twentieth Century* (1956).

as in any other area. The inevitable consequence of employing vague and nebulous standards for judging obscenity is the irrational suppression of all works "good" or "bad", which offend a sense of propriety or morality in censorial private groups and officials. See, Ginzburg, *An Unhurried View of Erotica* (1958). See also, the indiscriminate seizure of magazines in *Marcus v. Search Warrants, etc.*, 370 U. S. 717, 732, n. 25. Unless there is intervention by the courts, a great deal of art and literature will be curbed by those seeking to reduce to a minimum the number of "lustful thoughts" in each American's head.

The suppression of five magazines in Maryland because the periodicals contain stories concerned with sex and the pictures of partially draped females is not a minor incident. The principles established here affect the publication, distribution and sale of periodicals to the average person throughout the country, since national distribution of all periodicals is today the rule. Moreover, if stories dealing with sex and pictures of females in states of undress are to be taboo, then a large segment of the paperback industry is in danger. There is not a single novel or collection of short stories by Lawrence, Hemingway, Faulkner, Mailer, O'Hara, Joyce and Nabakov in soft backs today which does not deal with sex explicitly nor have the "come hither" (App. A 4) allurement of some attractive partially clad female on the cover. Illegitimate and unconstitutional practices in the area of freedom of the press always get their first footing by attacking the seemingly inconsequential "circular" or "leaflet" or "pamphlet" or "trashy book"—or "girlie magazine." With all deference, "it is the duty of courts to be watchful for the

constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis.*" *Boyd v. United States*, 116 U. S. 616, 635.

2. The state obscenity statute, as construed by the court below, invades the freedoms of speech and press incorporated in the liberty protected from state action by the Due Process Clause of the Fourteenth Amendment. The standards for judging obscenity enunciated by the court below are constitutionally impermissible, it is respectfully submitted.

(a) We approach this issue observing initially that the court below held that material having a "tendency to excite lustful thoughts" (App. A 2) is the essence of the test for obscenity. While uncertain as to the meaning of the *Roth* test (App. A 12), the Court felt that it was "bound" to reject the limitations of the "hard-core pornography" test as exemplified by the opinion of the Court of Appeals in *People v. Richmond County News, Inc.*, 9 N. Y. 2d 578, 175 N. E. 2d 681 (1961), and the "variable obscenity" test advanced principally in Lockhart and McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 Minn. L. Rev. 5 (1961) (App. A 11-12).

In thus rejecting any limitation of the interdicted material to "hard core" pornography, which the material here clearly was not, and permitting prosecution and conviction for the publication and sale of *any material* which has a tendency to excite "lustful thoughts", the state obscenity statute has been given limitless scope, the boundaries between protected and unprotected material completely obliterated. The statute does not aim, therefore, specifically at evils within the allowable

area of state control but, "on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press." *Thornhill v. Alabama*, 310 U. S. 88, 97.

A "lustful thoughts" test alone, unlimited even by strict confinement to "hard core" pornography, appears irrational and capricious, capable of achieving only the most fantastically inconsistent results. Such a test "is unrealistically broad for a society that plainly tolerates a great deal of erotic interest in literature, advertising, and art" (A. L. I., *Model Penal Code*, Tent. Draft No. 6, 1957, 10). Many works of recognized literary merit may conceivably excite "lustful thoughts". It is impossible to accept the notion, it is respectfully submitted, that an unfettered "lustful thoughts" test is compatible with the requirements of the First and Fourteenth Amendments in the light of history and this Court's decisions.

Moreover, if writings which tend to excite lustful thoughts can be suppressed, it is difficult to see why writings which tend to excite other allegedly objectionable thoughts cannot meet a similar fate. But compare, *Kingsley International Pictures Corp. v. Regents*, 360 U. S. 684; *Yates v. United States*, 354 U. S. 298.

We do not attempt here an extended analysis of the Solicitor General's representations to this Court in *Roth v. United States* (Brief, pp. 34-39), nor the significance of the decisions in *Roth v. United States (Alberts v. California)*, 354 U. S. 476; *One, Inc. v. Olesen*, 355 U. S. 371, reversing 241 F. 2d 772 (C. A. 9, 1957); *Times Film Corp. v. City of Chicago*, 355 U. S. 35, reversing 244 F. 2d 432 (C. A. 7, 1957)

and *Sunshine Book Co. v. Summerfield*, 355 U. S. 372, reversing 249 F. 2d 114 (C.A.D.C., 1957). See also, *Kingsley International Pictures Corp. v. Regents*, 360 U. S. 684, 692-695, 701-702. They are appraised at length in the trenchant dissent of Judge Hammond below (App. A 22-30) and have been the subject of critical evaluation by the courts and text writers. See, *State v. Jackson*, 350 P. 2d 495, 503-507 (Oregon, 1960); *People v. Richmond County News, Inc.*, 9 N. Y. 2d 578, 175 N. E. 2d 681, 682-686 (1961); Schwartz, *Criminal Obscenity Law: Portents From Recent Supreme Court Decisions, etc.*, 29 Pa. B.A.Q. 8 (1957); Lockhart and McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 Minn. L. Rev. 5, 19-39 (1960); Note, 7 De Paul L. Rev. 111, 113 (1957); *Comment*, University of Illinois L. Forum (1957), 499, 502-503; *Comment*, 60 W. Va. L. Rev. 89, 91 (1957); *Comment*, 26 Univ. of Chic. L. Rev. 309-313 (1959); Note, 11 West. Res. L. Rev. 669 (1960).

The petitioners respectfully submit that an appropriate conclusion which can properly be drawn from the totality of this Court's rulings, in the light of constitutional requirements, is that only hard core pornography is obscene. If the abstract test for obscenity is whether the predominent appeal of the material, considered as a whole, is to *a shameful or morbid interest* in nudity or sex and goes *substantially beyond customary limits* of candor in description or representation of such matters, then such test can only be objectively applied by accepting the premises that hard core pornography alone can be suppressed within the confines of such standard.

Moreover, if we are correct in assuming that the concept of obscenity is limited to hard core pornography, then it is submitted that a test for obscenity adopted by a state court which permits the suppression of material concededly outside the confined area, cannot be upheld consistent with the requirements of the First and Fourteenth Amendments. A substantial majority of this Court has rejected the view that there is greater latitude for state action under the word "liberty" under the Fourteenth Amendment than is allowed to Congress by the language of the First Amendment. *Roth v. United States*, 354 U. S. 476, 492, n. 31. If this Court assumedly acted in *Sunshine Book Co., One, Inc.* and *Times Film* upon the basis that the Constitution protected all of the material involved in those cases (the material in those cases was far more daring and audacious than the material involved herein), then it is submitted that the standards adopted by this Court must be equally applicable when the due process provisions of the Fourteenth Amendment are invoked against state action. "Where the First Amendment applies, it is a denial of all governmental power in our Federal system." *Marsh v. Alabama*, 326 U. S. 501, 511.

Petitioners respectfully submit that unless the material interdicted by federal and state obscenity laws is limited to hard core pornography, then all the issues of free speech and due process vagueness which were urged in the *Roth-Alberts* cases are again before this Court for consideration. It may appear that the difference between the "lustful thoughts" test adopted by the court below, and the "hard core" pornography test deemed implicit in this Court's decisions, is only one of

degree, but "the difference is no less real, because a difference of degree." *Heidermann v. American District Telegraph Co.*, 230 N. Y. 305, 308, 130 N. E. 302, 303 (1921). "When we deal with the complex of strands in the web of freedoms which make up free speech, the operation and effect of the method by which speech is sought to be restrained must be subjected to close analysis and critical judgment in the light of the particular circumstances to which it is applied." *Speiser v. Randall*, 357 U. S. 513, 520.

The "lustful thoughts" test adopted by the court below, with its rejection of hard core pornography as the objective boundaries of interdicted material under the test, permits those who have to apply the standard an arbitrary discretion for sweeping within its condemnation expression clearly within constitutional protection. Under the standard formulated by the court below men cannot even guess intelligently as to what it condemns. The only effect of such a standard for judging obscenity is to diminish the flow of free expression which a healthy society requires.

(b) This Court has held that the Fourteenth Amendment does not permit a conviction under a state obscenity statute unless the material complained of is found substantially to exceed the limits of candor set by contemporary community standards. *Roth v. United States*, 354 U. S. 476, 489. There can be no doubt that a correct construction and application of the "contemporary community standards" requirement in judging the obscenity of material is essential for the safeguarding of customary freedom of expression. The court below, it is respectfully submitted, has construed this basic ingredient in a manner totally inconsistent with constitutional requirements.

It should be noted that Judge Hammond in his dissent below protests the failure of the Court to indicate what standards of what community are involved (App. A 13-14). Indeed, there is no indication of whether national standards, or state or local standards are being considered. Petitioners submit however, that the infirmity in the opinion of the court below is of a more serious nature. The fact is, *and the record establishes*, that both the trial court and the court below merely adopted the method of "easy labeling"; the phrase appears in the opinion, but essentially the words "contemporary community standards" mean only to the court below that community standards (whatever the geographical coverage may be) *are merely the subjective reflection and moral outlook of individual judges.*

The record here, in the first place, is barren of any proof that the material goes substantially beyond the limits of candor in description of sex or nudity. The record affirmatively establishes, moreover, that the material does not go beyond such limits. The court below conceded that "the record shows that publications of a similar type had been on display and sold in the city for at least five years prior" to petitioners' arrests (App. A 2). Clearly this was some uncontradicted evidence that the material here did not go substantially beyond community toleration. Moreover, petitioners submit that Judge Hammond's additional statement in the dissenting opinion, undisputed, is also proof that the material here did not exceed community standards. "The subject matter, the descriptions and references found in the magazines held obscene in this case can be found in much the same form in literally hundreds of novels and stories which have either been accepted

as not obscene or have been found not to be." (App. A 20)."

It is respectfully submitted, therefore, that the record here points affirmatively to the conclusion that the court below deems "contemporary community standards" to be no more than the literary and psychological standards of the trier of the fact himself. This, petitioners submit, is substantial error. Unless, at the very least, the limits of candor of *the community* are the test for judging obscenity, and not the limits which a judge or jury may personally tolerate, freedoms of speech and press are seriously undermined. *Smith v. California*, 361 U. S. 147, 165-167, 171. Judges and juries cannot, where liberty of speech and press are at issue, condemn that which the community generally tolerates.

(c) The trial court below held that, without exception, the magazines and photographs were "neither literary in nature, artful in presentation, nor innocent in purpose" (App. B 31). As standards for judging obscenity, these were plainly impermissible. *J. Burstyn, Inc. v. Wilson*, 343 U. S. 495; *Winters v. New York*, 333 U. S. 507.

The court below held that "mere nudity in and of itself is not obscene" (App. A 3), and therefore the set of photographs showing various poses of a woman in progressive stages of undress ("though never quite

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[3]Judge Hammond added:

"I agree with the conclusion of the Court of Appeals of New York in its holding that the 'realistic accounts of normal sexuality' in the magazine 'Gent' (in which, as Judge Froessel makes plain in his dissenting opinion by extensive quotations and descriptions, the language and pictures were as direct and crude and vulgar as any in the magazines before us) was not obscene." (App. A 21-22.)

naked") was not "necessarily obscene" (App. A 3). So too, the magazine Black Garter, in which models are "scantily dressed" in "what might be described as coarsely offensive postures" (App. A 4) could not be deemed "strictly obscene", although "obviously intended to arouse sex appeal" (App. A 4). But more to the point, stated the court below, the "textual matter" accompanying the illustrations only discusses "the technique of using shadows and lights in photographing the nude" (App. A 4). Here it appears that the trial court's notions of what would excite "lustful thoughts" and what was tolerable to the trial court differed from those of the appellate court.

On the other hand, the five magazines, in the opinion of the court below, were obscene because they contained not only "pictures or drawings of nude or semi-nude women" showing "come hither" expressions and poses, but they were interspersed with "pointedly suggestive sex stories" (App. A 4).[4]

But this Court has held that sex and obscenity are not the same. *Roth v. United States*; *Alberts v. California*, 354 U. S. 476, 487. Books and magazines from almost the beginning of time have contained suggestive sex stories with illustrations of pretty and undraped women. In every age, men have enjoyed this kind of material. Clearly, today there can be little question that material of this kind excites no morbid or shameful interest in sex or nudity. If some collections of sex stories and illustrations are deemed to be of little literary merit or artistry, still if they do

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[4]It appears to be the unanimous view of the court below, majority and minority, that the material at issue is not hard core pornography (App. A 11-12, 20-30).

not go substantially beyond the limits of candor and are accepted and read openly without morbidity, generally for amusement or entertainment or escape, the First and Fourteenth Amendments forbid their suppression. The construction by the court below of the state obscenity statute to prohibit and punish the publication and sale of material containing nude and semi-nude pictures and "suggestive sex stories" appears inconsistent with the constitutional mandates. Liberty of taste is also entitled to the protection of the fundamental law. *Hannegan v. Esquire*, 327 U. S. 146, 157. See also, *Grove Press, Inc. v. Christenberry*, 276 F. 2d 433 (C. A. 2, 1960), aff'g 175 Fed. Supp. 488 (D.C.N.Y. 1959).

(d) The court below denominated the five magazines as "obscene", but that conclusion was reached, it is respectfully submitted, without an independent *constitutional* appraisal of the material. What the court below did was to conclude that the trial court's "findings of fact were correct" (App. A 5). The court pointed out that since the cases were tried by the court sitting without a jury, the court below had the power to review on both the law and the evidence "to determine whether in law the evidence was sufficient to sustain the conviction in each case, though we may not set the verdict aside on the evidence unless it is clearly erroneous" (App. A 3). Having upheld the trial court's findings that the five publications were "calculated to excite lustful thoughts in the mind of the reader" (App. A 5), the court below held that "we are unable to say that the trial court was in error ... to the evidence in convicting all of the defendants for selling one or more of these magazines" (App. A 5).

The balance of the court's opinion contains merely an attempt to explain or distinguish this Court's decision in *Roth-Alberts, Times Film, One, Inc., Sunshine Book Co., Adams, Kingsley, Butler*, with a final concluding statement that "until the Supreme Court specifically speaks further in this uncertain area, we think we are bound by what we understand the *Roth* test requires" (App. A 12). As Judge Hammond rightfully observed, the majority of the court below "failed to fulfill its obligatory duty to make a reflective independent appraisal of the controversial printings" (App. A 14) and failed to exercise a "constitutional judgment" (App. A 14), as the court below was required to do.

That a reviewing court cannot escape the responsibility of making a particularized constitutional judgment by saying that the trier of the facts had labeled material as "obscene" will hardly be questioned, it is respectfully submitted. *Roth v. United States*, 354 U. S. 476, 497-498; *Watts v. Indiana*, 338 U. S. 49; *People v. Richmond County News, Inc.*, 9 N. Y. 2d 578, 175 N. E. 2d 681-692; Lockhart and McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 Minn. L. Rev. 5, 114-120 (1960). Petitioners submit, however, that for a state reviewing court to so construe its governing law as to abdicate the essential judicial function of making a constitutional judgment in obscenity cases is to arbitrarily deprive persons of their liberty without due process of law. The obligation of the state courts to uphold the Constitution of the United States as the supreme law of the land, and to rule upon claims of invasion of federal rights whenever properly presented, are as binding as the obligation

which rests upon the federal courts, it is respectfully submitted. See, *Testa v. Katt*, 330 U. S. 386, 391. No meaningful hearing within constitutional intendment was afforded petitioners by the failure of the court to exercise the constitutional judgment it was required to make. See, *Morgan v. United States*, 298 U. S. 468, 304 U. S. 1.

For all of the aforesaid reasons, the statute herein, Maryland Code (1957), Art. 27, §418, as construed by the court below, is unconstitutional as violative of the free speech and press and due process provisions of the First and Fourteenth Amendments.

3. The charges against petitioners were totally devoid of evidentiary support so as to render their convictions unconstitutional under the due process clause of the Fourteenth Amendment. There was no evidence to support the essential ingredients of the offense.

The charge against each of these petitioners was that each had knowingly sold "obscene" magazines in violation of law. It is necessary therefore for the record to show that each of the petitioners sold magazines whose predominant appeal is to a shameful or morbid interest in nudity or sex, and which magazines go substantially beyond customary limits of candor in description or representation of such matters. In short, the record must show that to the average person, applying contemporary community standards, the dominant theme of the material sold by each of the petitioners taken as a whole appeals to prurient interest. *Roth v. United States (Alberts v. California)*, 354 U. S. 476, 489.

What does the record show with respect to these essential ingredients of the offense?

(a) There is absolutely no evidence in the record as to the outer limits of custom in description or representation of sexual matters. There is some evidence that the material was *within* the toleration of the community, but there is no evidence that the material here substantially exceeded contemporary community standards, nor was there any proof of the particlar community involved.

(b) No evidence appears in the record as to the appeal or effect of the magazines to or upon the average person. No testimony was offered by way of experts or other competent persons to show that these particular magazines would appeal to a shameful or morbid interest in sex or nudity of the average person, or would "arouse sex appeal" (App. A 4), or would excite "lustful thoughts." The record is as barren on this issue as it is on the issue of contemporary community standards.

(c) There is no proof in the record that *these petitioners* knew the alleged objectionable character of the "suggestive sex stories" in the publications, or that they had even read them. There is no proof in the record that these petitioners were engaged in "the commercial exploitation of the morbid and shameful craving for materials with prurient effect," for it is conceded by the court below that the petitioners only "engage in the retail sale of books and magazines in Baltimore City" (App. A 1). There was no claim below, and there is no proof in the record, that *these petitioners* "calculated" to excite lustful thoughts in the minds of the readers. "The only testimony against each defendant was that he had sold the magazine or pictures introduced against him" (App. A 13 14).

(d) All that is in the record are the magazines themselves. The trial court looked at the magazines and photographs and found that none was "literary in nature, artful in presentation, nor innocent in purpose" and that all had a "tendency to excite lustful thoughts" (App. B 31). The court below looked at the same magazines and photographs and decided on its own that the trial court's findings were correct as to five of the magazines but not as to the photographs and one other magazine.

How did the court below determine that each of the five magazines would have a tendency to excite "lustful thoughts" in the average person's mind? Since there is no evidence in the record, aside from the publications themselves, it is clear that the court inferred the "tendency" to excite lustful thoughts from the printed words and pictures in the magazines.

Was this the only inference permissible as to the effect of the publications on the minds of the average readers? Judge Hammond obviously thought not. In Judge Hammond's view, the material here would excite only thoughts of "sex" or "vulgarity" or "crudeness" or "cheap, poor taste" (App. A 20). And since we are exploring here the inner thoughts of the average person, an area in which the guess of one person without expertise is as good as any other, is it not equally reasonable to infer that the average person's thoughts on reading these magazines would have been "amusing", "entertaining", "funny", "absurd", "how true", etc. etc.

Since, it is respectfully submitted, all of the above inferences were reasonably permissible with respect to the thoughts which the publications here might have engendered, it appears plain that most of the thoughts

which the publications would "excite" were entirely "innocent". Indeed, if the court below equates the arousal of "sex appeal" with exciting "lustful thoughts", as it seems to do, then all the inferred thoughts engendered by the magazines were outside the domain of the law, it is respectfully submitted.

Nevertheless, if a "morbid or shameful" thought is not to be excited, it is apparent that the magazines here could just as reasonably have had the tendency to excite thoughts far removed from this forbidden area. Since in ordinary criminal cases the presumption of innocence prevails, the predominating "innocent" inferences should have been drawn rather than the single "guilty" inference, or, since equally reasonable and contrary inferences could be drawn from the same publications, it cannot be held that any single conclusion was proven.

The petitioners respectfully submit that there is no evidence in the record here to show that these publications went substantially beyond contemporary community standards; no evidence to show that the material appealed to the prurient interest of the average person; no evidence to show that these petitioners knew the alleged objectionable character of the magazines or intended to appeal to the prurient interest of readers, or engaged in such business; and no meaningful evidence to show that these publications had a tendency to or were calculated to excite lustful thoughts in the minds of their readers. It was, therefore, a violation of due process to convict and punish these petitioners without evidence of their guilt. *Thompson v. City of Louisville*, 362 U. S. 199; *Schware v. Board of Bar Examiners*, 353 U. S. 232.

4. The state statute, as applied to the publications here involved, violates the free speech and due process provisions of the First and Fourteenth Amendments. In applying the statute to these magazines, constitutional bounds have been exceeded.

(a) It is evident from the decision of the court below that the principal objection to these magazines is that they contain "suggestive sex stories" (App. A 4). The court, in *Hicklin* fashion, places into the reported decision "typical extracts" (App. A 5-6) of candid language contained in the stories and, which, in the opinion of the court, obviously render the publication obscene.

With all due deference, the view of the court below that the language in the passages quoted are beyond the protections of the Constitution for customary freedom of expression, simply ignores the realities of the present century, and reflects perhaps, as Professor Chafee noted (1 *Government and Mass Communications* (1947), 221) the difficulties in this area of judges who are "somewhat set apart from the regular run of people" by the seclusion and intense preoccupation of their work.

Within the limitations of space it is impossible to detail how completely the "genteel" literature of the Nineteenth century has been replaced by the "realistic" and "naturalistic" writings of the Twentieth. We do not discuss here the causes for this change which followed the First World War, the Great Depression, and on into the present atomic age. See, Cowley, *After the Genteel Tradition: American Writers Since 1910* (1937); Geismar, *Writers in Crisis: The American*

Novel Between Two Wars (1942); Fiedler, *Love and Death in the American Novel* (1960).

Since, however, the court below stressed the language of the characters in the stories involved herein, some note should be made of the extent to which such language appears in all literature today. Petitioners emphasize that their discussion here is limited to what *is*; not what *should be*. The issue here is customary freedom of expression; not the perennial debate of what is "good" or "bad" literature, or whether the Philistines or literati better serve a democratic society.

In 1960, under the auspices of the Library of Congress there was published a *Guide to the Study of the United States of America, Representative Books Reflecting the Development of American Life and Thought* (Govt. Pr. Office, 1960). The Guide is a series of bibliographical studies of civilization in the United States to which inquirers in any part of the world might refer. It is intended to give "a clearer vision of the tradition, meaning and character of civilization in these United States" (Introduction, IX). In the chapter on Literature, the following statement appears:

> "Another characteristic of contemporary creative writing, including poetry, is its frequent use of language formerly considered, in general, too crude or unpleasant to be used in 'polite society' and hence seldom or never embodied in literary expression. This uncommon 'language of common men' is sometimes employed with such fidelity as to shock the segment of the reading public that has been educated in classic American literature characterized by decorous, even elegant language,

as so much of the best 19th-century writing was. Some critics feel that this shock treatment, used deliberately, not only achieves realism for characters to whom the language used would be natural, but also awakens complacent readers to awareness of conditions about which they may prefer to remain ignorant. It is doubtless true, also, that contemporary writing reflects one of the recurring changes in taste and manners that literature has mirrored down the ages."

Fidelity in language natural to uneducated characters is the hallmark of contemporary writing. This is as true for the literary genius as it is for the ordinary scribbler. In *Grove Press, Inc. v. Christiansberry*, 270 F. 2d 433 (C. A. 2, 1960), Judge Clark made the following cogent observations (438): "Obviously a writer can employ various means to achieve the effect he has in mind and so probably Lawrence could have omitted some of the passages found 'smutty' by the Postmaster General and yet have produced an effective work of literature. But clearly it would not have been the book he planned, because for what he had in mind his selection was most effective, as the agitation and success of the book over the years have proven . . . *Actually in present day literature such descriptions of physical relations appear as regular staples of literary diet and quite without Lawrence's straightforward and somewhat refreshing candor.*" (Emphasis added).

We do not attempt here "a battle of excerpts," but petitioners do assert that the extracts to which the court below took umbrage appear in comparable language in thousands of writings read by millions of per-

sons in the United States—in books, paperbacks, periodicals and other writings of a similar nature. Indeed, in comparison with other writings of wide popularity in respected book circles, writings which have sold in the millions, the language of the stories here is quite ordinary. That petitioners can match excerpts, however, is not as important as the fact that comparable writings reflect an attitude of tolerance, of acceptance of candor and directness, by a mature and sophisticated reading public which do not require official blinders, and which the Constitution protects from all governmental interference.

Some of the works to which we refer and their authors are: James Branch Cabell, *Jurgen* (1919); Erskine Caldwell, *"God's Little Acre* (1933), an extremely realistic book concerned with depravity and degeneracy; James T. Farrell, *Studs Lonigan, A World I Never Made*, and others, all written in the tradition of naturalistic realism; Faulkner (Nobel prize winner), *Sanctuary*, a tale of sex, cruelty and violence, and see also by the same author, *The Sound and the Fury* (1929), a story of a degenerate Southern family, and *The Wild Palms*, two interwoven novelettes, one of which deals with the attempt of a physician to escape from society with his beloved but who winds up in prison after the woman's death from an abortion; Hemingway, *The Sun Also Rises* (1926), a story of drinking, loving and general aimless merriment, all emphasizing conversational realism and objective presentation; Robinson Jeffers, poems dealing with murder,

incest and horror; Lewis, *Elmer Gantry* (1927), satirizing religious hypocrisy; Smith, *Strange Fruit*, the story of a love affair between members of different races; Jones, *From Here to Eternity*, a realistic story of Army life in Hawaii; Mailer, *The Naked and the Dead* (1948), realistic speech of soldiers in the war in the Pacific; and Deer Park (1955), portraying the denizens of the motion picture world in Hollywood; O'Hara (nominated for Nobel prize), *Appointment in Samarra* (1934), sex, alcohol and gangsters, and frankly realistic; *Butterfield 8*, a realistic portrayal of a nymphomaniac, and *Ten North Frederick* (1955), depicting in detail the sexual activities, marital and extra-marital of a middle-aged Pennsylvania lawyer; Salinger, *Catcher in the Rye* (1951), a novel about a neurotic adolescent; Nabakov, *Lolita*, the tale of a continuous seduction of or by a twelve year old girl by or with a middle-aged lover; Lawrence, *Lady Chatterley's Lover*, *Sons and Lovers*; Joyce, *Ulysses*, and the famous Molly Bloom soliloquy; Metalious, *Peyton Place*, a bestseller, replete with realistic language and incidents involving rape, incest, sexual deviations, nymphomania and other sexual aberrations; Teller, *Twilight Men*, homosexuality; Aldrich, *We Walk Alone*, lesbianism.

There should also be noted here the effect in this contemporary age of the motion picture industry offering its wares in local theaters from one end of the country to another which "created a kind of mas-

sophistication that had its own effects on manners, morals, and customs, as did the inexpensive magazines sold across the land" (*A Guide to the Study of the United States of America, supra*, 99).[5] The fact of the matter is that most writers today think of the problems of the contemporary world primarily in clinical and psychological frames of reference. Not merely the language used but also the subjects popularly treated by contemporary writers have undergone substantial change. Commonplace lives have been revealed under the surface to cover abnormalities and compulsions not heretofore known. Whether this reflection of modern man is accurate, or truncated, may be debated, but that candor in language and theme dominates all mass media of communication today is a stubborn fact of life. If the Constitution protects all writings which do not go beyond the outer limits of custom in description or representation of sexual matters, the magazines here are entitled to protection.

(b) Not only has the application of the state obscenity law here invaded the area of customary freedom of expression, but petitioners submit that the stories contained in the magazines are not "utterly without redeeming social importance." *Roth v. United*

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[5]Such motion pictures would include *Cat On a Hot Tin Roof*, the story of a wife trying to reestablish sexual relations with her husband, who is suspected of being a homosexual; *Tea and Sympathy*, a married woman helps a young student attain his manhood; *Ten North Frederick*; *Peyton Place*; *The World of Suzie Wong*, the world of prostitution; *Kitty Foyle*, the unhappy mistress of an employer; *Forever Amber*, *From Here to Eternity*; *Anatomy of a Murder*, realistic language on the screen by a deceiving spouse; *The Revolt of Mamie Stover*, a prostitute struggles against Army restrictions; *The Apartment* (Oscar winner), describing the extra-marital philanderings of "the organization man," and many others.

States (Alberts v. California), 354 U. S. 476, 484. In making this assertion, we assume that it is possible, under a system of free institutions, to defend the freedom of these writings without necessarily subscribing to the personal morality depicted therein or approving the literary quality of the writing. We assume further that we are measuring the value of these writings with respect to their relation to "the normal person" (App. A 3), the average adult. *Butler v. Michigan*, 352 U. S. 380.

We assert here simply the undeniable fact that love, affection, sex ideas, sex opinions, sex conceptions and sex impulses are elements of human experience, and literature necessarily preoccupies itself with all these aspects, the acts in which life begins. The physical details of such matters cannot be removed from all writings without distorting the true image of life that literature should provide. See, Farrabee, *Morality and Obscenity* in *Freedom of Book Selection* (Am. Lit. Assn., 1954), 39. If the presentation by the scribbler appears exaggerated, it should nevertheless be recalled that writings which unwittingly "suggest the complexities of human motivation, the discrepancy between will and action, the immense possibilities of self-deceit, the 'mystery of iniquity'" (Fiedler, *Love and Death in the American Novel* (1960), 150) have social value. The very stories here reveal, perhaps crudely, the inevitable discrepancy between what life at any moment is imagined and what it is; they serve to deny many publicly asserted orthodoxies, to expose some dearly preserved deceits. Fiedler, *supra*, 481.

Moreover, there is great need for carefully delimiting the area of ideas "utterly without redeeming

social importance" (entitled seemingly to no protection) from "unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion" (Apparently entitled to almost full protection), 354 U. S. 476, 484. The proper sense of the term "ideas" as embodied in the protective provisions of the First Amendment is surely not limited to *Hochpolitik*. If stories of sex relations are to be suppressed because "without redeeming social importance," or as lacking in ideas in "any proper sense of the term", cannot the same standard be used to suppress a great body of contemporary literature, as well as murder books, six-gun westerns, detective stories and other literature of violence? It is not unusual for "village tyrants" to appear today on television, radio or newspapers, reading or expounding the "typical excerpts" and vociferously urging that most of modern day writings be suppressed as "utterly without redeeming social importance." See, Harvey, *Comstockery in America* (1960), 86-96.

Further, these magazines appear to furnish to many persons a form of amusement, of relaxation, of catharsis. For the average adult, these readings very often help to remove unhealthy attitudes towards sex; tolerant standards reduce the tendency to treat almost everything from the sight of an ankle to pages of asterisks in a writing as something indecently stimulating. There is, it is submitted, a healthier attitude toward sex in literature or art today than in 1900 when

even the expression, "legs of a piano", brought blushes to old and young. It may be that such discussion of sex is repellent to many persons, but, it is respectfully submitted that such discussion is utterly without redeeming social importance cannot be supported. The application of a standard so inherently ambiguous as "ideas of no redeeming importance" threatens every new work of art and literature, no matter that the work be of great genius or vital moral worth.

The state statute, as applied below, is for the above said reasons unconstitutional under the free speech and press provisions of the First Amendment as subsumed into the due process provisions of the Fourteenth Amendment.

5. Finally, petitioners respectfully show that the state statute, as applied and construed by the court below, arbitrarily and capriciously creates [illegible] certain publications and denies [illegible] upon grounds founded on no reasonable distinction or substantial difference. The line drawn between the set of photographs and the magazine *Life* [illegible] and the other five magazines, is irrational when measured against the unfettered standard of "tendency to excite lustful thoughts" enunciated by the court below. As such, the convictions here are under a statute which denies petitioners the equal protection of the laws and deprives petitioners of their liberty without due process of law in violation of the applicable provisions of the

Fourteenth Amendment. *Yick Wo v. Hopkins*, 118 U. S. 356; *Smith v. Cahoon*, 283 U. S. 553, 566-567; *Morey v. Doud*, 354 U. S. 457.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

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Of Counsel.

APPENDIX "A."

Opinion and Judgment.

Court of Appeals of Maryland.

No. 55 (Advanced), September Term, 1961.

Filed August 9, 1961.

Harry Monfred, James Spissler, Samuel Mendelson, Sander A. Siegel, Benjamin M. Siegel and Albert King vs. State of Maryland.

Appeal from the Criminal Court of Baltimore, Anselm Sodaro, Judge.

Argued by *Martin B. Greenfeld* (*William Greenfeld* and *Albert B. Polonsky* on the brief), all of Baltimore, Md., for appellants.

Argued by *Clayton A. Dietrich*, Assistant Attorney General (*Thomas B. Finan*, Attorney General; *Saul A. Harris* and *James W. Murphy*, State's Attorney and Assistant State's Attorney, respectively, for Baltimore City, on the brief), all of Baltimore, Md., for appellee.

Argued before Henderson, Hammond, Prescott, Horney and Marbury, *JJ.*

Horney, *J.*, (Dissenting opinion by Hammond, *J.*)

The appellants, who engage in the retail sale of books and magazines in Baltimore City, were convicted by the Criminal Court of Baltimore of violating Code (1957), Art. 27, §418, which makes it a misdemeanor for any person to "knowingly * * * sell * * * any lewd, obscene, or indecent book, magazine * * * drawing or photograph." The subject matter of the prose-

cutions was six magazines,[1] commonly known or described as "girlie" magazines, and a set of semi-nude photographs portraying a sequential "striptease."[2]

The magazines and photographs were openly displayed and offered for sale without overcharge along with other types of magazines on newstands or in the establishments of the several appellants. The magazines which are the subject of this appeal were purchased by members of the Baltimore City Police Department, who were specifically instructed to make purchases of named or similar magazines. The set of photographs was purchased by a member of the Criminal Justice Commission. The record shows that publications of a similar type had been on display and sold in the city for at least five years prior to the arrest of the appellants.

The trial court—applying the obscenity test set forth in *Roth v. United States* (and *Alberts v. California*), 354 U. S. 476 (1957)—concluded that the magazines and photographs were "neither literary in nature, artful in presentation, nor innocent in purpose" and that the dominant theme of the magazines and photographs dealt "with sex in a manner appealing to prurient interest" in that they had a "tendency to excite lustful thoughts," and found that such materials were "lewd, obscene and indecent" and therefore violated the obscenity statute of this State. All the defendants were found guilty and all were sentenced to pay fines.

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[1]The publication entitled Candid was introduced as evidence against Harry Monfred; Consort against James Spissler; Sextet against Samuel Mendelson and Albert King; Cloud 9 against Mendelson; Torrid against Sander A. Siegel and Benjamin M. Siegel; and Black Garter against Monfred, King and both Siegels.

[2]The set of fifteen photographs was introduced against the defendant King.

The appellants claim (i) that the magazines and photographs are not obscene within the meaning of the statute because such materials do not "as a matter of law" exceed contemporary community standards; and (ii) that if such materials are obscene under the statute, then the statute violated the First and Fourteenth Amendments to the Constitution of the United States. But the real contention is—inasmuch as it is claimed that the suspect material is not "hard-core pornography"—that the appellants were immune from prosecution under the statute.

Since these cases were tried by the court sitting without a jury, we have the right to review them on both the law and evidence to determine whether in law the evidence was sufficient to sustain the conviction in each case, though we may not set the verdict aside on the evidence unless it is clearly erroneous. Maryland Rule 741 c.

In cases such as these where prosecution is based primarily on the exhibits introduced as evidence, oral evidence, as was the case here, is usually not abundant. The exhibits speak for themselves, but must be perused and examined with care. This has been done as to each of the seven exhibits—six magazines and one set of photographs.

An examination of the set of photographs shows various poses of a woman in progressive stages of undress (though never quite naked), which to the normal person might be offensive or repulsive, but they are not necessarily obscene under the statute. And since mere nudity in and of itself is not obscene, we think the trial court in convicting King for selling the photographs was clearly in error as to the evidence.

The same is true with respect to the magazine *Black Garter*. Most of the pictures in this magazine are of models who pose for "glamor" photography. They are portrayed scantily dressed either in black lingerie or white furs and other accessories in what might be described as coarsely offensive postures, but the pictures, even though obviously intended to arouse sex appeal, are not strictly obscene. And, which is more to the point with respect to the issue of obscenity, the textual matter accompanying the illustrations is in the main innocuous. Instead, it purports to discuss in detail the technique of using shadows and lights in photographing the nude. Therefore, since this magazine taken as a whole is not obscene, we think the trial court also erred in convicting Monfred, King and the Siegels for selling it.

But when each of the other five so-called "girlie" magazines—*Candid*, *Consort*, *Sextet*, *Cloud 9* and *Torrid*—is taken as a whole, that is when the pictures reproduced therein are examined in conjunction with a perusal of the textual material, it is apparent that all of these publications are obscene within the meaning of the statute as well as under the obscenity test approved by the majority in the *Roth-Alberts* case, *supra*. All of them, without exception, present numerous pictures or drawings of nude or semi-nude women showing what the State characterized as "come hither" expressions and poses interspersed with pointedly suggestive sex stories so placed that a reader if he needs visual aid in following the story has only to glance at

the opposite page for additional stimulation. All of these five publications were obviously calculated to excite lustful thoughts in the mind of the reader.[3] Thus, having made a determination of our own that the findings of fact were correct, we are unable to say that the trial court was in error as to the evidence in convicting all of the defendants for selling one or more of these magazines; nor did the lower court reach the wrong conclusion as to the law.

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[3]Sextet (Vol. 1, No. 3), for example in addition to showing more than fifty pictures and drawings of nude and semi-nude women in its forty-eight pages, also contains eleven articles indexed as "features," "fiction" and "pictorial." Four of such articles will suffice to demonstrate the intention to arouse prurient interest. Typical extracts from these include the following:

From "His Only Weakness" (a lewd narrative detailing the seduction of a hardened woman by a philanderer):

"That's my proposition * * *. If you want me in bed, now's your one and only chance." (p. 4)

* * *

"Now he was absolutely sure he was going to have [her]. And, if necessary, he would make it by force. Sort of an unlegalized rape." (p. 6)

* * *

"Suppose you let me feel you." (p. 40)

* * *

"He could see her delicious breasts straining against the material of her smart black dress." (p. 40)

* * *

"He didn't say a word. He just nodded his head, leaned forward, grabbed her hand and dragged her into his bedroom.

"When it was over, they lay quietly on the bed . . . naked and exhausted." (p. 41)

From "The Paper Back Girls" (emphasizing the increase in the sexual aspect of cheap literature):

"* * * she is practically a virgin because she has only been laid with eleven different men, not counting those before she was 13. [She] also confesses her fondness for dykes without giving any count in such regard." (p. 11)

* * *

"'Kiss me . . . I haven't been laid in more than six mon

In the *Roth* (and *Alberts*) case, Roth, who was a "rare book" dealer, was convicted of a violation of the Federal obscenity statute. Alberts, who was a distributor of photographs of nude and semi-nude women in various poses, was convicted under the California obscenity statute. In neither case was there any question as to whether or not the books sold by Roth and the photographs distributed by Alberts were obscene in fact. Thus, all that was decided was whether, on

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. . . she reached up and, with a terrific yank, ripped the front of her dress wide open, bearing her breasts . . . rich, sexual woman was everywhere. . . .'" (p. 12)

* * *

"The girls round robin it with the men and as circumstances permit they pair off and have an even more exciting time with each other." (p. 12)

From "The Cherry Orchard" (a story of a minor seduced by a prostitute):

"Larry's pants bulged with the thought." (p. 17)

* * *

"What a broad to pop with! He swallowed hard and crossed his legs." (p. 18)

* * *

"Her whisper was almost a sexual action. 'Your place or mine?'" (p. 19)

* * *

"She moved her groin hard into his." (p. 19)

* * *

"He pulled her sweater from her shoulder, and she swung around. Nude, except for panties. * * * 'I told you gin makes me passionate.' She kicked off her shoes and flung herself on the bed. * * * 'I'll let you take the panties off. Guys like to do that.'" (p. 19)

* * *

"Seconds later, he became a man." (p. 42)

From "A Date With July" (a fantasy of a partially nude woman inviting a man to her house):

"'I'm so happy you could come,' she purrs with a sexy smile and a suggestive pose of welcome.

"Arm and arm they enter the semi-dark apartment." (p. 20)

their faces, the federal and state statutes under consideration were violative of the First and Fourteenth Amendments respectively.

In speaking for the majority, Justice Brennan held that both statutes were valid, and, in the process, stated (at p. 489) that the test of obscenity is "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." Material having such an interest was defined in a footnote as "material having a tendency to excite lustful thoughts." The Court also held that "obscenity is not within the area of constitutionally protected speech and press."

Chief Justice Warren concurred in the result reached in each case. His theory was—because it was not the material but a person that was on trial—that what is obscene should depend in the main on the reprehensible conduct of the seller engaging in "the commercial exploitation of the morbid and shameful craving for materials with prurient effect" and not on the obscenity of the materials sold. Justice Harlan concurred in the result in *Alberts* and dissented in *Roth*. He was of the opinion that federal obscenity censorship should be limited to hard-core pornography and that the states should be allowed broader censorship powers. Justices Black and Douglas dissented. They were against all obscenity censorship except where it is shown that "the particular publication has an impact on action that the government can control."

In the next term after the *Roth-Alberts* decision, the Supreme Court disposed of several other obscenity cases by short per curiams. In three of them, the Court, by reversing federal courts of appeal

without any explanation for the reversals other than the citation of the *Roth* (and *Alberts*) case—gave final protection to the materials in question. In one, *Times Film Corp. v. City of Chicago*, 355 U. S. 35 (1957), which involved prior censorship of a French cinema with English sub-titles based on a novel by Colette, the appellant attacked the Chicago censorship ordinance on the ground that it imposed an unconstitutional prior restraint. The appendix to the appellant's brief indicated that the censors had not taken any of the artistic merits of the film into account, and in fact four of the censors testified that the picture had not aroused their sexual desires, pruriently or otherwise. The appendix further indicated that there was no nudity, other than one short scene showing a boy's buttocks, and that the real reason a permit was denied was to prevent children from seeing the movie. The decision of the appellate court in this case had been handed down before the Supreme Court had decided *Roth*. In the second reversal, *One, Inc. v. Olesen*, 355 U. S. 371 (1958), which involved the right to send the magazine *One*—a publication dealing with homosexuality—through the mails, officials of the Post Office Department had invoked the federal obscenity statute because the magazine was considered to be lewd and obscene. The petition for certiorari in this case had also been prepared before the decision in *Roth*. The government urged that the lower court had satisfied the Roth test, but the petitioner contended that the Supreme Court had not theretofore dealt with this specific quesion. A copy of the magazine was not included in the printed record; nor was it reproduced in either of the briefs, but, since the sole question was whether the magazine was obscene—a question of fact

—the Court, by citing *Roth*, apparently applied the *Roth* test in determining that the publication was either not obscene or that taken as a whole it was not obscene. In the third reversal, *Sunshine Book Co. v. Summerfield*, 355 U. S. 372 (1958), another case involving the mailing of a magazine—*Sunshine & Health*—a copy of the publication was also not included in the printed record, but it is a "nudist" type magazine—a representative copy of which is included in the transcript in the instant case—in which, although the nudist way of life is advocated and the pictures show the genital areas of the body, there is nothing obscene in the text of the magazine. Thus, it appears that the reversal was based on the concept that mere nudity is not obscenity or the decision may have been based on the fact that the text was not in fact obscene. But in *Adams Newark Theatre Co. v. City of Newark*, 354 U. S. 931 (1957), involving the Newark city ordinances prohibiting lewd, obscene or indecent shows and performances, in which the petitioner had raised issues of vagueness and freedom of expression in a proceeding for a declaratory judgment before the city had attempted to enforce the ordinances, the Supreme Court of the United States, in a brief per curiam, summarily affirmed the judgment of the New Jersey Supreme Court which had upheld the constitutionality of the ordinances by citing the *Kingsley* (354 U. S. 436), *Roth* and *Alberts* cases. And, in a fifth case, *Mounce v. United States*, 355 U. S. 180 (1957), the government having made a "confession of error" that the test used by the court of appeals was "materially different" from the *Roth* test, the judgment below was reversed and remanded to the district court for consideration in the light of *Roth*.

We think the *Times Film* case it fairly distinguishable from the instant case in that the censors not only made no effort to apply any sort of reasonable obscenity test, but principally because the main reliance of the appellant was on the "prior restraint" theory rather than the lack of an obscenity test. The *Sunshine Book* case is also easily distinguishable in that, unlike the instant case, there were no obscene stories in the nudist magazine. And, although the *One, Inc.* case is not as easy to distinguish as the other two, it is a fact that it, like the *Sunshine Book* case, also involved federal postal censorship, not a state criminal prosecution; besides, since the constitutional issue was not formally raised, it is possible that the decision may not have been based on the unconstitutionality of the statute.

Other recent federal obscenity cases also have no direct bearing on the cases before us. In *Butler v. Michigan*, 352 U. S. 380 (1957), decided prior to *Roth*, the Supreme Court merely condemned the Michigan obscenity statute by holding that it was violative of the First and Fourteenth Amendments in that it prohibited the sale to an adult of a book unfit for a minor—without suggesting a constitutionally sanctioned alternative. In *Kingsley Books, Inc. v. Brown*, 354 U. S. 436 (1957), also decided before *Roth*, where the defendant was convicted under the New York obscenity statute, there was no question but that the material was obscene, and there was no intimation of what was soon to be stated in *Roth*. In *Kingsley Int'l Pictures Corp. v. Regents of the Univ. of N. Y.*, 360 U. S. 684 (1959), which involved the famous motion picture *Lady Chatterley's Lover*, the Supreme Court, without deciding whether or not the picture was

obscene, declared that a part of the New York motion picture obscenity statute was unconstitutional in that it violated the basic "freedom to advance ideas" guaranteed by the First Amendment. And in *Smith v. California*, 361 U. S. 147 (1959), in which the defendant was convicted of having obscene books in his possession, a Los Angeles city ordinance was declared unconstitutional in that it did not require proof of scienter on the part of the possessor, but again, the majority did not pass on the question of whether the books were actually obscene.

Thus, in the cases since *Roth*, the Supreme Court — at least in its majority opinions in the *Kingsley Pictures* and *Smith* cases — did not specifically apply the *Roth* test to the allegedly obscene materials before it in these cases. However, the test seems to have been applied in the per curiam reversals (*Times Film Corp. Inc.*, and *Sunshine Book*) and in the per curiam affirmance (*Adams Newark Theatres*), but we do not know for sure — other than that the Roth test of obscenity will be strictly construed — what the reasoning of the Court was in any of these per curiams.

It may well be that the Supreme Court will in time (assuming it has not already done so) declare that only "hard-core pornography" is not protected by the constitution, as a majority of four of the Court of Appeals of New York (in two opinions, the latter concurring in the result reached in the former, each of which was concurred in by one other judge) did recently in construing the meaning of the obscenity statute of that State in *People v. [illegible] News, Inc.*, — N. E. 2d — (N. Y. 1960), involving the sale and distribution of the magazine *Hicut*, when, in

discarding the *Roth* test, it adopted an obscenity test of its own.[4] Or the Supreme Court might eventually accept the concept of "variable obscenity"[5] expressed by Chief Justice Warren in his concurring opinion in the *Roth-Alberts* case to the effect that the question of obscenity must turn, not on the material itself, but on the motives of the seller. In passing—since these sales were unquestionably commercial—we note that a variable obscenity test could have been applied in this case. But, until the Supreme Court specifically speaks further in this uncertain area, we think we are bound by what we understand the Roth test requires.

Applying the Roth test to the censorship power of the State under the provisions of our obscenity statute, as was done in these cases (although incorrectly with respect to two of the exhibits), it is, as we see it, evident that the conviction of King for selling the set of semi-nude photographs should be reversed; that the convictions of Monfred, King and both Siegels for selling the magazine *Black Garter* should also be reversed; and that the convictions of all of the appellants for selling one or more of the obscene magazines called *Candid, Consort, Sextet, Cloud 9* and *Torrid*, should be affirmed, and we so hold.

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[4]Judge Fuld in the opinion written by him stated that "the test of the obscene, of the pornographic, is not in the tendency or appeal of the material but rather in its content objectively appraised" and then added that "it [the obscene] focuses predominantly upon what is sexually morbid, grossly perverse and bizarre, without any artistic or scientific purpose or justification."

[5]This concept seems to have been favored by Dean Lockhart and Professor McClure of the University of Minnesota Law School in the scholarly treatise on this area of the law entitled Censorship of Obscenity: The Developing Constitutional Standards published in 45 Minn. L. Rev. 5 (1960).

Judgments against Albert King for selling the set of semi nude photographs and against Henry Monfredi, Albert King, Sander A. Siegel and Benjamin M. Siegel for selling the magazine Black Garter *reversed; the Mayor and City Council of Baltimore to pay one seventh of the costs.*

Judgments against all appellants for selling one or more of the obscene magazines Candid, Consort, Sextet, Cloud 9 *and* Torrid *affirmed; appellants to pay six sevenths of the costs.*

Hammond, *J.* (dissenting)—

The opinion of the Court in this troublesome case is essentially syllogistic: the Maryland statute proscribing the sale of obscene books and magazines is to be construed as broadly as the Supreme Court will permit; the case of *Roth v. United States*, 354 U. S. 476, 1 L. Ed. 2d 1498, held that obscenity is not protected by the constitutional guarantees of freedom of speech and press, and said that material is obscene if, to the average person, applying contemporary community standards, "the dominant theme of the material taken as a whole appeals to prurient interest;" the trial judge found the magazines sold by the defendants appealed to "prurient interest" and, since this Court cannot say he was clearly wrong in his determination, the judgments and sentences of guilty must be affirmed. I find the premises and the deductive process unsound, and the conclusion therefore necessarily wrong and am constrained to dissent and express my reasons for disagreement.

The only testimony against each defendant was that he had sold the magazine or pictures introduced against

him. There was no testimony as to contemporary community standards (except that the magazines had been sold openly in Baltimore for five years), or as to what comprises a community, or as to what effect the pictures and magazines would have on the average person. The Court held the separate group of pictures and those in the magazines not to be in themselves obscene (and with these holdings I agree), but decided that most of the texts, considered with the related pictures, justified Judge Sodaro in finding the magazines obscene under the Roth standards, as the Court understands them. Despite the Court's statement that its determinations were independent, this is no more in actuality than holding that "Judge Sodaro thought that most people would think the magazines obscene, we cannot say he was wrong and therefore, under the Maryland statute and the Constitutional tests, they are obscene."

In deciding the case on this basis the Court, I think, failed to fulfill its obligatory duty to make a reflective independent appraisal of the controversial printings, for as Justice Harlan, concurring in *Roth* said (as to the suppression of obscenity) at p. 497-498 of 354 U. S.: "* * * the question of whether a particular work is of that character involves not really an issue of fact but a question of constitutional *judgment* of the most sensitive and delicate kind." A State appellate court, no less than the Supreme Court, has the same obligation. *The People, ex. r. Richmond County News, Inc.*, (N. Y.)—N. E. 2d—; Lockhart and McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 Minn. L. Rev. 114-120; 4 Davis, *Administrative Law*, 2008; *Niemotko v.*

Maryland, 340 U. S. 268, 271, 95 L. Ed. 267; *Feiner v. New York*, 340 U. S. 315, 316, 95 L. Ed. 267; *Napue v. Illinois*, 360 U. S. 264, 271, 3 L. Ed. 2d 1217; *Watts v. Indiana*, 338 U. S. 49, 93 L. Ed. 1080. Since *Roth*, cases that have recognized this obligation include *United States v. Keller*, 259 F. 2d 54 (3rd Cir.); *Capital Enterprises, Inc. v. City of Chicago*, 260 F. 2d 670 (7th Cir.); *Commonwealth v. Moniz* (Mass.), 155 N. E. 2d 702.

That the publications here involved are a form of vulgar and tawdry entertainment (for some part of the populace), lacking in all social value or artistic or scientific justification, does not deprive them of the constitutional protection of free speech and press. In *Winters v. New York*, 333 U. S. 507, 510, 92 L. Ed. 840, the Court, noting its obligations as to an aspect of a free press (comic crime books) "in its relation to public morals" said: "We do not accede to appellee's suggestion that the constitutional protection for a free press applies only to the exposition of ideas. The line between the informing and the entertaining is too elusive for the protection of that basic right * * * What is one man's amusement, teaches another's doctrine. Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature." *Hannegan v. Esquire*, 327 U. S. 146, 157, 90 L. Ed. 586, said: "What seems to one to be trash may have for others fleeting or even enduring values."

The concept of obscenity in law is a complex and difficult one. I take it the Maryland Legislature intended by its use of "obscene" in the statute (Code

(1957), Art. 27, Sec. 418) what the word meant in prevailing leading legal thought; otherwise it would be too vague to constitute a permissible standard in a criminal statute.

In *The People, etc. v. Richmond County News, Inc.*, *supra*, the Court of Appeals of New York, in holding a "girlie" magazine (indistinguishable from the worst of those in the case before us) not to be obscene, said of the New York statute (the equivalent of the Maryland section) (at p. ..... of ..... N. E. 2d .....):

"In the *Roth* case (354 U. S. 476, *supra*), the court did say that 'obscene material is material which deals with sex in a manner appealing to prurient interest' (p. 487), and that the test was 'whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest' (p. 489). These statements, however, can only indicate the broad boundaries of any permissible definition of obscenity under the United States Constitution; they do not pretend to, and cannot, give specific content to the meaning of 'obscene' as it appears in our statute."

In the *Roth* opinion the phrase "appeal to prurient interest" was lifted from a more comprehensive definition in the American Law Institute's Model Penal Code, Tentative Draft No. 6, Sec. 207.10(2) (a definition which the Court seemingly adopted as sound): "* * * A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, *i.e.*, a shameful or morbid interest in nudity, sex or excretion and if it goes substantially beyond customary limits of candor in description of representation of such matters * * *." The authors of Model Penal Code continue:

"We reject the prevailing test of tendency to arouse lustful thoughts or desires because it is unrealistically broad for a society that plainly tolerates a great deal of erotic interest in literature, advertising, and art, and because regulation of thought or desire, unconnected with overt misbehaviour, raises the most acute constitutional as well as practical difficulties. We likewise reject the common definition of obscene as that which 'tends to corrupt or debase.' If this means anything different from tendency to arouse lustful thought and desire, it suggests that change of character or actual misbehaviour follows from contact with obscenity. Evidence of such consequences is lacking * * *."[1]

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[1]The Court of Appeals of New York comments on the last statements in The People, etc. vs. Richmond County News, Inc. (N. Y.)—N. E. 2d—saying: "It is noteworthy that, despite the reams of materials on the effect of books, magazines and other media of expression on sexual conduct, 'there is very little scientific evidence' on the subject (St. John-Stevas, Obscenity in the Law (1956), p. 196; see, also, Brown vs. Kingsley Books, 1 N. Y. 2d 177, 181, fn. 3; United States vs. Roth, 237 F. 2d 796, 812-817, per Frank J., concurring, affd. 354 U. S. 476). Indeed, two authoritative writers in the field have concluded that, 'Although the whole subject of obscenity censorship hinges upon the unproved assumption that "obscene" literature is a significant factor in causing sexual deviation from the community standard, no report can be found of a single effort at genuine research to test this assumption by singling out as a factor for study the effect of sex literature upon sexual behavior.' (Lockhart and McClure, Obscenity and the Courts, 20 Law and Contemporary Problems, 587, 595; see, also, American Law Institute, Model Penal Code, Tentative Draft No. 6, Sec. 207.10, p. 44). Some commentators have gone even further and suggested that 'for an undetermined number of individuals, the writing or reading of obscenity may be a substitute for rather than a stimulus to physical sexuality.' (American Law Institute, Model Penal Code, Tentative Draft No. 6, Sec. 207.10, p. 35). The suggestion in these writings is that there is no causal connection between what is regarded as 'obscene' and antisocial conduct of a sexual nature."

The Supreme Court of Oregon in a careful opinion in *State v. Jackson*, 356 P. 2d 495, 507, adopted the Model Penal Code definition of obscenity as the meaning of the Oregon statute on the subject, and said:

"On the other hand, the Model Penal Code, by requiring that the material, to be obscene, must appeal to 'prurient interest' and go 'substantially beyond customary limits of candor in description or representation' emphasizes strongly that the manner of presentation must itself amount to shameful and disgusting conduct outside the pale of what is tolerable to the community at large. The majority opinion in the Roth case defines 'prurient' as 'having a tendency to excite lustful thoughts.' 354 U. S. 476, at page 486, note 20, 77 S. Ct. at page 1310. We think, however, that the court had in mind the narrower meaning used by the Model Penal Code or means to use the narrower meaning cases following Roth."

The *Roth* case unquestionably established two constitutional tests of obscenity: (1) the material must be judged as a whole and (2) it must be judged under contemporary community standards by its impact upon average or normal persons, not the young, the weak, or the susceptible. There can be little doubt, I believe, that "community standards" means not state or local communities but rather the standards of society as a whole.[2] The phrase originated with Judge Learned Hand in his opinion in *United States v. Kennerly*, 209

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[2]Manifestly local community standards as to what is or is not obscene vary to a considerable degree. What a jury in the more unsophisticated sections of Maryland—in some parts of the Eastern Shore and in more remote Southern and Western Maryland—might consider beyond the pale, a jury in Baltimore or the metropolitan counties of the State might find acceptable. Lock-

F. 119, 121: "* * * should not the word 'obscence' be allowed to indicate the present critical point in the compromise between candor and shame at which the community may have arrived here and now? * * * To put thought in leash to the average conscience of the time is perhaps tolerable, but to fetter it by the necessities of the lowest and least capable seems a fatal policy." It seems plain Judge Hand was referring not to the standards of states or local communities, but rather to the contemporary standards of society as a whole, and that the Supreme Court had in mind that same standard in adopting the phrase. Messrs. Lockhart and McClure so interpret the *Roth* opinion. They say in their article *Censorship of Obscenity* at p. 111 of 45 Minn. L. Rev.:

"* * * We believe the Supreme Court did not, as some of the proponents of censorship hopefully thought, approve of the application of state or local community standards in obscenity cases. Indeed, in one of

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hart and McClure in their article in 45 Minn. L. Rev. 5 point out at page 36 that "In Los Angeles, New York, and perhaps also Chicago, the Post Office and Justice Departments had difficulty convicting persons for mailing obscene matter; courts and juries there were too sophisticated, their attitudes too liberal * * * the two departments supported the enactment of legislation authorizing prosecution of a mailer at any place through which the mail passed, as well as at the place of receipt of the mail. It would be easier to obtain convictions and heavier sentences in the hinterland * * *." The authors add at page 109 that "At trials in more straight-laced communities, the government could make particular effective use of such trial tactics as refusing to consent to waivers of jury trials; and then, having insisted on jury trials, it could peremptorily challenge the most literate and best educated jurors. If 'contemporary community standards' has reference to the standards of state or local communities, and if those standards are to be applied by a jury, then these tactics will enable the government to secure convictions which heretofore would have been difficult or impossible to obtain."

of its per curiam decisions after the *Roth-Alberts* opinion, the Court indicated that it would not tolerate the application of restrictive local standards in obscenity censorship."

The error into which the trial judge and majority of this Court fell, in my view, was to confuse and equate sex (and vulgarity, crudeness and cheap, poor taste) with obscenity. They are not synonymous and society as a whole and the courts recognize this. The subject matter, the descriptions and references found in the magazines held obscene in this case can be found in much the same form in literally hundreds of novels and stories which have either been accepted as not obscene or have been found not to be. The Supreme Court in *Roth* emphasized the necessity of differentiating between sex and lewdness:

"However, sex and obscenity are not synonymous * * * The portrayal of sex, *e. g.*, in art, literature and scientific works, is not sufficient reason to deny material the constitutional protection of freedom of speech and press. Sex, a great and mysterious motive force in human life has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern." (p. 487 of 354 U. S., p. 1508 of 1 L. Ed. 2d).

I do not believe the trial judge permissibly could have been convinced beyond a reasonable doubt that the contents of the magazines, judged by the contemporary standards of our society as a whole, both appealed to "a shameful or morbid interest" in nudity or sex and at the same time went "*substantially* beyond customary limits of candor in description or rep-

resentation of such matters."[3] As the American Law Institute said, we live today in "a society that plainly tolerates a great deal of erotic interest in literature, advertising and art." Judge Bryan made the same point in finding "Lady Chatterley's Lover" not obscene in *Groves Press, Inc. v. Christenberry*, 175 F. Supp. 488:

"The tests of obscenity are not whether the book or passages from it are in bad taste or shock or offend the sensibilities of an individual, or even of a substantial segment of the community. * * * (p. 501)

"* * * the broadening of freedom of expression and of the frankness with which sex and sex relations are dealt with at the present time require no discussion. In one best selling novel after another frank descriptions of the sex act and 'four-letter' words appear with frequency. These trends appear in all media of public expression, in the kind of language used and the subjects discussed in polite society, in pictures, advertisements and dress, and in other ways familiar to all. Much of what is now accepted would have shocked the community to the core a generation ago. Today such things are generally tolerated whether we approve or not." (p. 502)

I agree with the conclusion of the Court of Appeals of New York in its holding that the "realistic accounts of normal sexuality" in the magazine "Gent" (in which, as Judge Froessil makes plain in his dissenting opinion by extensive quotations and description, the language

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[3]The Court found "Black Garter" not to be obscene. "Consort" and "Torrid" would not seem to be any more so under any reasonable test of obscenity. "Candid" and "Sextet" have one or two stories approaching the obscene and almost all of "Cloud Nine" is on the borderline.

and pictures were as direct and crude and vulgar as any in the magazines before us) was not obscene. Judge Fuld said for the Court at p. ..... of ..... N. E. 2d:

"The fact is, however, that, while the magazine contains many stories or pictures which are aesthetically tasteless and without any redeeming social worth, none of them is pornographic. Numerous pictures and cartoons of nude or semi-nude women and numerous descriptions and depictions of sexual arousal and satisfaction are to be found in 'Gent' but it contains nothing which smacks of sick and blatantly perverse sexuality."

Chief Judge Desmond, concurring, said at p. .....:

"This collection of sexy fiction and illustration has little of literary merit or artistry and yet it is not in the First Amendment sense filthy or disgusting or deliberately corruptive or offensive to common decency under prevailing standards of taste. Virtuous adults will reject it (as all of us Judges would were we not restrained by the *Roth-Alberts* legal test). Adolescents may be hurt by it. But our prepossessions are not the law and the reactions of children are not valid tests (*Roth v. United States*, 354 U. S. 476, 489, 490, *supra*)."

Whether the Court's reading of the Maryland statute, or mine, ir correct as a matter of interpretation may well be immaterial. I am convinced that the Supreme Court has left no constitutional leeway to make the interpretation the majority makes and that its result violates the constitutional rights of the defendants and the publishers of free speech and free press.

In seeking to go to the Supreme Court, *Roth* raised

four issues of substance—whether (a) the federal statute violated first amendment guarantees; (b) was too vague; (c) invaded the reserved powers of the States and the people; and, finally, (d) whether the publications were obscene. Roth seriously pressed only the first three; his argument on the fourth was so perfunctory the government did not reply. The Court limited the certiorari granted to the first three issues. The *Alberts* case, decided with *Roth*, ended in the Supreme Court in the same posture as *Roth*—at a level of abstraction so rarified that the facts had become immaterial.

The Solicitor General brought the case to a more earthy level. In his brief he pointed out that the violations of the Federal obscenity statute fell into three categories. The first, some two per cent, comprised "novels of apparently serious literary intent" challenged because "they concentrate on explicit discussion of sex conduct in a vocabulary based on four letter words." The second category, less than ten per cent, he said was border line material, mainly photographic. The final group, ninety per cent. of the whole, comprised what the Solicitor General described as "black market" or "hard-core" pornography. To make sure the Court knew what he meant by "hard-core pornography" he sent to the Court a carton containing numerous samples concededly in that category.[4]

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[4]The Solicitor General described "hard-core" pornography as follows:

"This is commercially-produced material in obvious violation of present law * * * This material is manufactured clandestinely in this country or abroad and smuggled in. There is no desire to portray the material in pseudo-scientific or 'arty' terms. The

The foregoing account of the *Roth-Alberts* case was taken from Lockhart and McClure, *Censorship of Obscenity*, 45 Minn. L. Rev. pp. 19-29. The authors later revert to the subject and conclude (p. 60):

"In voting to sustain the constitutionality of the obscenity statutes of California and of the United States, Justices Frankfurter, Burton, Clark, Brennan, and Whittaker must have had material of this kind in mind

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production is plainly 'hard-core' pornography, of the most explicit variety, devoid of any disguise.

"Some of this pornography consists of erotic objects. There are also large numbers of black and white photographs, individually, in sets, and in booklet form, of men and women engaged in every conceivable form of normal and abnormal sexual relations and acts. There are small printed pamphlets or books, illustrated with such photographs, which consist of stories in simple, explicit, words of sexual excesses of every kind, over and over again. No one would suggest that they had the slightest literary merit or were intended to have any. There are also large numbers of 'comic books,' specially drawn for the pornographic trade, which are likewise devoted to explicitly illustrated incidents of sexual activity, normal or perverted * * *. It may safely be said that most, if not all, of this type of booklets contain drawings not only of normal fornication but also of perversions of various kinds.

"The worst of the 'hard-core' pornographic materials now being circulated are the motion picture films. These films, sometimes of high technical quality, sometimes in color, show people of both sexes engaged in orgies which again include every form of sexual activity known, all of which are presented in a favorable light. The impact of these pictures on the viewers cannot easily be imagined. No form of incitement to action or to excitation could be more explicit or more effective.

"Brief for the United States, pp. 37-38, United States vs. Roth, 354 U. S. 476 (1957).

"The Solicitor General also sought to distinguish hard-core pornography from material in 'the borderline entertainment area.' He said:

"The distinction between this [hard-core pornography] and the material produced by petitioner and others, as discussed above, is not based upon any difference in intent. Both seek to exploit the erotic market place. The difference is that the 'black-market' traffickers make no pretence about the quality and nature of the material they are producing and offering.

* * *."

for hard-core pornography, particularly in pictorial form, is so blatantly shocking and revolting that it would have been impossible for the Justices to put it out of mind. Since the basic issue before the Court was only the constitutionality of the statutes on their faces and in a vacuum, without regard to their application in the two cases, it seems likely that the Court upheld their constitutionality as imaginatively applied to hard-core pornography.

D. H. Lawrence wrote in Pornography and Obscenity in Sex Literature and Censorship (1953):

"But even I would censor genuine pornography, rigorously. It would not be very difficult. In the first place, genuine pornography is almost always underworld, it doesn't come into the open. In the second, you can recognize it by the insult it offers, invariably, to sex, and to the human spirit.

"Pornography is the attempt to insult sex, to do dirt on it. This is unpardonable. Take the very lowest instance, the picture post-card sold underhand, by the underworld, in most cities. What I have seen of them have been of an ugliness to make you cry. The insult to the human body, the insult to a vital human relationship! Ugly and cheap they make the human nudity, ugly and degraded they make the sexual act, trivial and cheap and nasty.

"It is the same with the books they sell in the underworld. They are either so ugly they make you ill, or so fatuous you can't imagine anybody but a cretin or a moron reading them, or writing them."

The Kronhausens in Pornography and The Law (178-243 (1959)) say pornographic books "are always made up of a succession of increasingly erotic scenes without distracting non-erotic passages. These erotic scenes are commonly scenes of willing, even anxious seduction, of sadistic defloration in mass orgies, of incestuous relations consummated with little or no sense of guilt, of superpermissive parent figures who initiate and participate in the sexual activities of their children, of profaning the sacred, of super-sexed males and females, of Negroes and Asiatics as sex symbols, of male and particularly female homosexuality, and of flagellation, all described in taboo words. The sole purpose of pornographic books is to stimulate erotic response, never to describe or deal with the basic realities of life."

(As summarized by Lockhart and McClure, Censorship of Obscenity, 45 Minn. L. Rev. 63-64.)

See also the graphic description of the illicit traffic in "hard-core" pornography detailed in Chapter 1 of James Jackson Kilpatrick's "The Smut Peddlers" (1960).

"We conclude, therefore, that the concept of obscenity held by most members of the Court is probably hard-core pornography, a conclusion consistent with the Court's 'rejection of obscenity as utterly without redeeming social importance.'"

This view is strongly confirmed by the per curiam decisions which followed *Roth* on distinctly mundane levels. In each on the citation of *Roth* the Court reversed United States Court of Appeals decisions that had upheld obscenity censorship, and demonstrated that in *Roth* it had placed really very tight restraints on what can constitutionally be censored as obscene.

The views of Messrs. Lockhart and McClure as to the meaning of *Roth* undoubtedly are shared by the Court of Appeals of New York which, in *The People, etc. v. Richmond County News, Inc., supra*, clearly indicated its interpretation of the New York statute as reaching only "hard-core" pornography was compelled by the *Roth* and the per curiam holdings. Chief Judge Desmond, concurring in the *Richmond* case, said so in so many words, and, concurring in *Kingsley Inter. Pic. Corp. v. Regents of Univ. of N. Y.* (N. Y.), 151 N. E. 2d 197, 207-208, observed that the Supreme Court in the per curiams must have looked at the challenged material and found it not obsence under *Roth*. Other cases which would seem to have shared the same views include those in the footnote below.[5]

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[5]Excelsior Pictures Corp. vs. City of Chicago, 182 F. Supp. 400 (N. D. Ill.); Commonwealth vs. Moniz (Mass.), 155 N. E. 2d 762; City of Cincinnati vs. Walton (Ohio), 145 N. E. 2d 407; United States vs. Keller, 259 F. 2d 54 (3rd Cir.); People vs. Silberglitt, 182 N. Y. S. 2d 536.

One of the significant per curiams which followed *Roth* was *Times Films Corporation v. City of Chicago* 355 U. S. 35, 2 L. Ed. 2d 72. The Court of Appeals described the motion picture "The Game of Love," held obscene by it, as follows:

"We found that, from beginning to end, the thread of the story is supercharged with a current of lewdness generated by a series of illicit sexual intimacies and acts. In the introductory scenes a flying start is made when a 16 year old boy is shown completely nude on a bathing beach in the presence of a group of younger girls. On that plane the narrative proceeds to reveal the seduction of this boy by a physically attractive woman old enough to be his mother. Under the influence of this experience and an arrangement to repeat it, the boy thereupon engages in sexual relations with a girl of his own age. The erotic threat of the story is carried, without deviation toward any wholesome idea, through scene after scene. The narrative is graphically pictured with nothing omitted except those sexual consummations which are plainly suggested but meaningfully omitted and thus, by the very fact of omission, emphasized. * * *

"We do not hesitate to say that the calculated purpose of the producer of this film, and its dominant effect, are substantially to arouse sexual desires. We are of the opinion that the probability of this effect is so great as to outweigh whatever artistic or other merits the film may possess. We think these determinations are supported by the effect which this film would have upon the normal, average person." (244 F. 2d 432, 436).

A second appeal, *One Incorporated v. Olesen*, 355 U. S. 371, 2 L. Ed. 2d 352, was from the decision of

the Court of Appeals of the Ninth Circuit, holding the magazine "One" and the advertisement in it of the magazine "Circle" which contained pictures and stories of homosexuality and lesbianism obscene. The Court of Appeals described its findings in this way:

"The article 'Sappho Remembered' is the story of a lesbian's influence on a young girl * * *. This article is nothing more than cheap pornography calculated to promote lesbianism. It falls far short of dealing with homosexuality from the scientific, historical and critical point of view.

"The poem 'Lord Samuel and Lord Montagu' is about the alleged homosexual activities of Lord Montagu and other British Peers and contains a warning to all males to avoid the public toilets while Lord Samuel is 'sniffing round the drains' of Piccadilly (London). The poem pertains to sexual matters of such a vulgar and indecent nature that it tends to arouse a feeling of disgust and revulsion. It is dirty, vulgar and offensive to the moral senses. * * *

"An examination of 'The Circle' clearly reveals that it contains obscene and filthy matter which is offensive to the moral senses, morally depraving and debasing, and that it is designed for persons who have lecherous and salacious proclivities.

"The picture and the sketches are obscene and filthy by prevailing standards. The stories 'All This and Heaven Too' and 'Not Til the End,' pages 32-36, are similar to the story 'Sappho Remembered,' except that they relate to the activities of the homosexuals rather than lesbians. Such stories are obscene, lewd and lascivious. They are offensive to the moral senses,

morally depraving and debasing." (241 F. 2d 772, 777, 778).

The third case, *Sunshine Book Company v. Summerfield*, 355 U. S. 372, 2 L. Ed. 2d 352, involved a nudist magazine. The Court of Appeals quoted with approval the language of Sunshine Book Company v. McCaffrey, 112 N. Y. S. 2d 476, 483, that:

"Where the dominant purpose of nudity is to promote lust, it is obscene and indecent. The distribution and sale of the magazines in this case is a most objectionable example. The dominant purpose of the photographs in these magazines is to attract the attention of the public by an appeal to their sexual impulses. * * * Men, women, youths of both sexes, and even children, can purchase these magazines. They will have a libidinous effect upon most ordinary, normal, healthy individuals. Their effect upon the abnormal individual may be more disastrous." (249 F. 2d 114, 118, 119).

The Supreme Court must have made an independent examination of the material in each case and found that censorship offended constitutional privileges for the Court simply reversed on the citation of *Roth*, and so terminated the litigation and gave final protection to the material.

The material it protected had been thought obscene by the lower court judges, applying what they deemed to be the contemporary standards of the average or normal person. Yet the Supreme Court, as I interpret its actions, held the pictures and writings were not obscence under the *Roth* standards. I can only conclude that as of now the Supreme Court will permit the proscription only of hard-core pornography and

I find nothing in the magazines before the Court coming within that category.

The Supreme Court in *Roth* (p. 488 of 354 U. S., p. 1509 of 1 L. Ed. 2d) said, speaking of "the fundamental freedoms of speech and press," that "Ceaseless vigilance is the watchword to prevent their erosion by Congress or by the States. The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests."

The background of *Roth*, and the three per curiams that followed, lead me to conclude that the door has been opened very slightly for the censors—not enough to permit them to get at the magazines in this case—and that the *Roth* standard, as understood and applied by the Supreme Court, is a very tight standard, reaching only "hard-core" pornography. If I am right the application of the Maryland statute, applied as the majority has applied it in this case, was unconstitutional.

I would reverse the judgments appealed from.

APPENDIX "B."

Oral Opinion of Trial Court at Conclusion of Trial.

(The Court) Stand up, Mr. Monfred, Mr. Spissler, Mr. Mendelson, Messrs. Siegel and Mr. King. I have considered the memorandum of law submitted by counsel for all of these defendants and the State's Attorney. I have examined and appraised the publications and photographs involved in this prosecution, namely: "Black Garter" (Surprise Edition); "Candid" (No. 9); "Consort" (Vol. 1, No. 1); "Sextet" (Vol 1, No. 3); "Cloud Nine" (No. 5); and "Torrid" (Vol. 1, No. 1) and the other picture cards that were introduced in evidence.

Applying contemporary community standards, I have concluded that the material and photographs contained in these publications, and picture cards, are neither literary in nature, artful in presentation, nor innocent in purpose; that the dominant theme of the material and photographs, and picture cards, deals with sex in a manner appealing to prurient interests, having a tendency to excite lustful thoughts. Therefore, these publications and photographs, and picture cards, are lewd, obscene and indecent in violation of the obscenity statute as charged in the indictments.

The verdict is guilty as to each defendant in each indictment.

APPENDIX "C."

Constitutional Provisions and Statutes Involved.

1. The pertinent provisions of the First Amendment to the United States Constitution are:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; . . ."

2. The pertinent provisions of the Fourteenth Amendment to the United States Constitution are:

> "No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. The provisions of the Code of Maryland, Art. 27, Section 418 are:

> "(a) If any person shall knowingly bring or cause to be brought into this State for sale or exhibition, or shall sell, lend, give away or offer to give away, or show or have in his or her possession with intent to sell or give away, or to exhibit, show, advertise or otherwise offer for loan, gift, sale or distribution any lewd, obscene or indecent book, magazine, pamphlet, newspaper, story paper, writing paper, picture, card, drawing or photograph, or any article or instrument of indecent or immoral use, or shall design, copy, draw, photograph, print, utter, publish or prepare such book, picture, card, or printed any circular, advertisement or notice of any kind, or giving information orally, stating when, where, how or of

whom or by what means such a lewd, indecent or obscene article or thing can be purchased, seen or obtained, shall in every such case be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not exceeding two hundred dollars or shall be imprisoned not exceeding one year, or be both fined and imprisoned in the discretion of the court; provided, that this section shall not apply to any person committing the acts thereby prohibited with intent to prevent violations of this subtitle or to procure the punishment of offenses against the same.

"(b) If any person shall be found violating the provisions of this subheading in or about any newsstand, book store, drugstore, market, or other mercantile establishment and shall be found to be an agent, officer, or employee of some other person who is actively engaged in the operation of such an establishment, these facts shall be presumptive evidence that the one found violating the provisions of this subheading was doing so within the scope of his employment and within the course of his employer's business and with the knowledge of his employer; but it shall be competent for the defendant in any such case to rebut this presumption. This section shall not apply to any person committing the acts thereby prohibited with intent to prevent violations of this subheading or to procure the punishment of offenses against the same.

"(c) The word 'person' as used in this subheading means any individual, firm, partnership, association, corporation, company, or organization of any kind."